No. 94-947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 292

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REPLY BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 292 *

1. *Overview*: Town & Country's ("T&C's") central contention here is focused on union programs requiring union members who work for a nonunion employer, as a condition of continued good standing membership, to engage in an active union effort to organize the employer's employees (and sometimes providing union remuneration for so doing). T&C argues that such individuals, who concededly are doing "employee" work for "employee" pay (or who are applying for such work), are not "employees" within the meaning of that term in § 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(c). According to T&C, by instituting such a program the union usurps the rightful control an employer has over an individual who works for the employer as an "employee"; hence, such union-member workers are not NLRA § 2(3) "employees" at all. That being so, T&C maintains, a nonunion employer has *carte blanche* to refuse to hire or, once hired, to terminate, a union-member worker participating in such a program. *See* Brief For Respondent Town & Country Electric, Inc. ("T&C Br.") at 35-37.

It facilitates analysis of this position to begin with several points that are beyond dispute. First, NLRA § 7, 29 U.S.C. § 157, protects the right to "form, join and assist" labor organizations, which right necessarily includes both the right to be a union member and the right to engage in active union organizing activity. Second, NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits employer discrimination based on union membership and on active

* The International Brotherhood of Electrical Workers Local 292 was the Intervenor/Respondent in the court below and is, under Rule 12.4 of the Court's Rules, a party in this Court. This reply brief supports the position being taken by the petitioner and is therefore filed in tandem with the filing of the petitioner's reply brief.

union organizing activity. *Radio Officers v. Labor Board*, 347 U.S. 17 (1954). Third, § 8(b)(1), 29 U.S.C. § 158(b)(1) recognizes that such organizations, through their democratic membership processes, have the authority to establish a wide range of internal rules consistent with public law regulating the conduct of members. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). In this regard there is no contention here—nor could there be—that union rules establishing an active organizing program, requiring participation in that program as a condition for an exemption from the union prohibition against working under nonunion conditions, and providing recompense for such participation violate the NLRA or any other public law.[1]

On the face of things, then, T&C's position that a lawful form of union activity negates the protections of the Act designed to protect forming, joining and assisting unions is paradoxical in the extreme. And, as we show in detail later, T&C fails entirely in its one perfunctory effort to establish a predicate for its position in the language and legislative history of NLRA § 2(3) or in the common law of agency.

Indeed, T&C and its *amici* barely make a pretense of treating with the only legal issue here—the meaning of the term "employee" in NLRA § 2(3). Rather, their presentations are a study in realpolitik. Stripped of the

[1] T&C and its amici do complain that although management surveillance of, and infiltration into, a union can be an unfair labor practice, there appears to be no symmetrical prohibition upon union "infiltration" of an employer. That is simply untrue. The statute does protect management's ability to carry out its labor relations policy free of all union influence and does so through the assurances of loyalty from *supervisory* and *managerial* employees. *See NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *American Broadcasting Cos. v. Writers Guild West, Inc.*, 437 U.S. 411 (1978). The Act thus permits an employer to reject as a supervisor or a manager, the union member or union staff person who intends to further union organizing aims. On the other hand, all "employees' *are*, under the statute, entitled to "form, join and assist" labor organizations, and all employers are banned from denying employment to "employees" who lawfully seek to do so.

embellishments, their point is this: Active construction union organizing programs of the kind that generated this case can, and on occasion have, lead to activity that disrupts the employer's operations and goes beyond the kind of organizing activity protected by NLRA § 7. That being so, nonunion construction employers need an absolute and unqualified right to refuse to hire union members who participate in such programs, or if such a worker is by mischance hired, to fire him on ascertaining his status.[2]

[2] Situations in which union-member workers who are involved in an active union organizing program engage in improper unprotected activity on the job (such as intermittent, partial or "sitdown" strike activity, slowdowns, or vandalism) are analytically indistinguishable from situations involving any other union-supporter employee engaging in the same activity. The employer has a general right to run its operations that is untouched by §§ 7, 8(a)(1) & (a)(3) and so long as he is exercising that right, the employer is free to discipline or discharge the wrongdoing worker. *See, e.g., NLRB v. Fansteel Mfg. Co.*, 306 U.S. 140 (1939); *Embossing Printers, Inc.*, 268 NLRB 710, 723 (1984), *enf'd mem.*, 742 F.2d 1456 (6th Cir. 1984); *Johns-Manville Prods Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), *cert. denied*, sub nom. *Oil, Chemical & Atomic Workers v. NLRB*, 436 U.S. 956 (1978); *NLRB v. Marshall Car Wheel Co.*, 218 F.2d 409 (5th Cir. 1955) (walkout intentionally timed when molten iron was about to be poured would have caused serious physical damages to the plant and was therefore unprotected); *see generally* Hardin, I *Developing Labor Law* (1992), 161-168; II, *The Developing Labor Law* (1992) 1110-1120.

Situations in which employers establish prophylactic rules that disqualify applicants for employment because of a concern that that they will engage in unprotected concerted activity raise more novel questions. So far as we are aware, there is no case law judging an employer rule banning workers who have engaged in improper unprotected activity or workers who are part of a program that has made it a practice to authorize such activity, or workers who the employer on some objective basis believes have a propensity to engage in such activity. It may be that the Board would conclude that such rules, particularly when promugated by an employer following a "non-union" labor relations policy, are discriminatory in violation of § 8(a)(3) (or violate § 8(a)(1)); that such rules are entirely lawful under the Act; or that such rules can only be judged through a more particularized fact-sensitive set of rules. Be that as it may, the essential point is that these are substantive NLRA questions to be evolved from §§ 7,

Taken on its own terms, this argument relies on a *non sequitur*. The fact—assuming it to be a fact—that *some* construction union member/workers participating in active union organizing programs may go beyond the bounds of the law (or even that *some* programs as a whole may go beyond those bounds) does not entail the conclusion that it is proper to ostracize all construction union members who engage in all such programs. For, by the same hypothesis, the only sin of other union members (and other programs) is the lawful organizing activity that otherwise might not take place and that nonunion contractors do not want to take place.

Beyond that, the conclusion that union-member workers participating in such programs are NLRA § 2(3) "employees" does *not* grant such workers any dispensation whatsoever to engage in any organizing—or any other employment—activity that is *not* protected by the Act (*see* n.2, *supra*), or negate the employer's authority to enforce neutral rules setting standards of productivity, order, and commitment. *See* Brief for International Brotherhood of Electrical Workers Local 292 ("IBEW Br.") at 16-17, 42-46.

At bottom, T&C and its *amici* believe that what the Act allows nonunion employers in this regard is not sufficient to balance what the employers regard as an improper dispensation that allows unions to stimulate their members—through union rules and remuneration—to seek employment in nonunion settings with an object of furthering an active union organizing program. According to T&C, the proper means of "correcting" the current "unjust" situation is to impose an artificial limitation on § 2(3)'s employee definition. But, as we noted in our opening Brief, even if "the tactics used here deserve condemnation . . . this would not justify attempting to pour that condemnation into a vessel not designed to hold it."

8(a)(1) & 8(a)(3) in cases in which the employer in fact has adopted such a rule, not status questions to be evolved from the definition of employee in § 2(3) in cases in which the employer, in fact, had no such rule and acted on a discriminatory basis.

NLRB v. Insurance Agents International Union, 361 U.S. 477, 496 (1960).

2. *T&C's Factual Premises*: Given their objective, T&C and its *amici curiae* are intent upon litigating a case other than the case actually before the Court. All quote a miscellany of initial and intermediate decisions in NLRB cases that have not reached the Board;[3] an article concerning recent construction union organizing strategies based upon surmise and conjecture rather than fact;[4] a document that purports to reveal union organizing

[3] For example, T&C relies on the Report of the NLRB General Counsel, Bureau of National Affairs, *Daily Labor Report* (Nov. 28, 1994) at D-2 to D-3. Brief for Respondent Town & Country Electric, Inc. ("T&C Br.") at 18-19.

In the case reported upon, however, at the time of the concerted activities in question, *all* the individuals working for the employer were union members, and the opinion does not distinguish between individuals who were union members at hire and individuals who joined the union after being hired. *Id.* at D-2. Moreover, the NLRB General Counsel *declined* to issue a complaint, not because the individuals in question were *not* "employees" but because the employees' activities were *not* protected by § 7. That case, and its disposition by the General Counsel, therefore cuts against T&C's position by demonstrating that while, under the NLRB's decision in this and similar cases, union members who participate in active organizing programs are § 2(3) "employees" under the Act, they, like all employees, are protected from discharge when engaged in union-related activities *only* to the degree their activities are within the range protected by the Act.

[4] Herbert Northrup, *"Salting" the Contractors Labor Force: Construction Unions Organizing with NLRB Assistance*, XIV Journal of Labor Research 469 (1993).

In a recent case heard by an Administrative Law Judge, Herbert Northrup appeared as an expert witness and attempted to demonstrate "that union members who apply for work and who write 'volunteer union organizer' or words to that effect on their applications are not bona fide applicants." *H.B. Zachry Co.*, Nos. 12-CA-14962, 12-CA-14962-2, 12-CA-15018 (1993), ALJ Op. at 23. The ALJ commented on the testimony as follows:

> [A] brief analysis of Professor Northrup's testimony shows the fallacy of Respondent's position. . . . One of the more interesting facts is that Northrup's " 'expert opinion' " is based solely on conversations and consultation with employers . . . .

strategies, put out by individuals who have no connection whatever with the union in this case, with its international union, or so far as we can ascertain, with any union; [5] and an international union organizing department pamphlet providing non-binding suggestions to the international's affiliates which the union in this case never adopted.[6]

This none-too-subtle effort to create an identity between construction union organizing programs of the kind that generated this case and wrongdoing by the participating union members rests on an evidentiary basis far too flismy to support it. And, it is not surprising that the bits and pieces T&C cites are only a small part of the real situation.

There have been far-reaching changes both in the economics of the construction industry and in the applicable legal framework. *See John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), *enf'd*, 843 F.2d 770 (3d Cir.

> Northrup conceded that he had never interviewed a single employee at any jobsite concerning the Union's "Fight Back Program." Nor has Northrup spoken with any officer or other official of the Union regarding the program. Aside from the obvious potential bias of his expert opinion, Northrup also conceded that he had not done any study as to how much time "volunteer organizers" spend engaging in organizing activities once hired. . . . Using Northrup's own standards leaves little room for doubt that the Union was engaged in a serious organizing effort . . . . [ALJ Op. at 22-23.]

[5] T&C, cites a document called *A Troublemaker's Handbook: How to Fight Back Where You Work—And Win !* no less than five times in its brief. T&C Br. at vi. Yet there is, as far as we are aware, no evidence whatever that this document, prepared by worker activists and directed to *all* employees, not specifically to union members was read by, much less followed by, any discriminatee in this case or adopted by their union.

[6] IBEW Special Projects Department, Setting As Protected Activity Under The National Labor Relations Act (March 1993). While the IBEW and Local 292 are affiliated organizations, each is a separate legal entity and the international's suggestions are not binding on its local unions. *See, e.g., Coronado Coal Co. v. Mine Workers*, 268 U.S. 295 (1925).

(1988).[7] These changes have caused many construction unions to turn from an organizing approach based on restricting the supply of qualified union member craftspersons who would work for nonunion contractors to induce the employers to sign pre-hire union contracts to the organizing approach followed by industrial unions in organizing industrial employees. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *NLRB v. International Broth. of Elec. Workers*, 481 U.S. 573, 592 (1987). These construction unions have therefore relaxed their rules against their out-of-work members working for nonunion contractors, while requiring or encouraging the members who work on nonunion worksites to engage in on-the-job organizing activity. Pet. App. 46a-47a. Sometimes the unions seek to encourage union members to take such jobs by assuring that the members will not lose union pay or benefits; sometimes there is no such economic "make whole" policy.

Based on the old regime, contractors who are operating nonunion have presumed that their "nonunion" status was a given and would be accepted as a given by construction unions and by their employees. *See* Pet. App. 61a-62a (T&C assumed, prior to the recent change in union rules, that " 'the union opposed the hiring of any of its members by a nonunion employer' " and that consequently only "union renegades, [who] pose[] no organizational threat", would apply to work for nonunion contractors).[8]

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[7] Under *Deklewa*, unions face the reality that employers signatory to a collective bargaining agreement can at the conclusion of the agreement walk away from a collective bargaining relationship established under § 8(f) of the Act, 29 U.S.C. § 158(f); only if the union affirmatively establishes that a majority of the employees in the pertinent unit have chosen union representation is the union assured that the presumptions of majority support applicable in other industries will prevent employers from "going nonunion" at will. *See, e.g., Brannan Sand & Gravel*, 289 NLRB 977 (1988).

[8] As the ALJ noted, the fact that many Town & Country employees had union backgrounds is therefore not a demonstration of the employer's willingness to accept union representation, but of the employer's belief that in light of union prohibitions on

Such contractors, including, it appears, T&C in this case, view the organization of their workforce as anathema and those construction unions that are no longer willing to maintain separate "union" and "nonunion" sectors of the industry as sworn enemies. These employers are willing to go to any length not to hire or retain union-member construction craftspersons who might engage in perfectly lawful organizing activity on non-working time and in non-working areas.

For example, in one case, an employee who was *not* a union member prior to going to work for the contractor and who joined the union and became a member of the union's voluntary organizing committee was then discriminated against in recall from layoff because of his "open support for the Union." The ALJ found that "testimony about [the employee's] productivity [failures] was pure fabrication in an attempt to obviate the real [§ 8(a)(3)] reason for not wanting [him] to return to work." *H.B. Zachry Co., supra,* ALJ Op. at 20. Moreover, the same employer, who automatically disqualified *all* applications that included the information that the applicant was a "volunteer union organizer," was, the ALJ found, engaged in a "sham . . . complicated game Respondent has developed . . . to weed out certain applicants while at the same time constructing a defense that Respondent had no knowledge of that applicant's union sentiments." In fact, found the ALJ, the employer rejected eighteen applicants from union members summarily "because of [the applicants'] union affiliation" and not for any other reason. *Id.* at 29.

Another recent case involved a "union 'salting program' that permits union members to work for non-union employers with permission from the business manager," for the purpose, among others, of having its members "provide information about unions to non-union workers." *Tulatin Electric,* No. 35-CA-7099 (1995) (ALJ Opinion).

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working nonunion "competent [formerly union] electricians could be added to its payroll with little risk that ardent union members would be among those hired." Pet. App. 62a.

The union members participating in the program are admonished to "work as hard for a non-union contractor as they would for a union contractor," to "try to make a favorable impression" and, in particular, *not* to engage in "sabotage . . . lying, stealing, cheating, obtaining information unlawfully, usurp[ing] corporate opportunity . . . [or] mak[ing] any assumption that nonunion employees or former union employees are less competent than union members". *Id.*

The ALJ noted that the owner of the respondent company was "deeply hostile toward the Union . . . referring to Local 48 as organized crime trying to put him out of business" and told his superintendent "to eliminate wherever possible any personnel that were affiliated with the Union"; told his employees that " 'as long as he owned the Company it would never be union' "; and instituted a no-"moonlighting" policy for the specific purpose of eliminating "salts". The ALJ concluded that "Respondent's union animus is . . . pervasive and the nature of the unfair labor practices . . . egregious, striking at the very heart of the Act. . . Respondent['s] . . . conduct was directed against any applicant that had either worked for a unionized employer or that it suspected of having ever had a union connection." *Id.* at 2-3, 6-7; [9] *see also Hogan*

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[9] T&C's amici repeatedly characterize as "blackmail" the unions' recognition that given the antiunion animus of many nonunion construction industry employers, it is likely that the employers will refuse, illegally, to hire avowed union adherents, and that filing of unfair labor practices may be necessary to enforce the law. Brief of Amicus Curiae Associated General Contractors of America ("AGC Br.") at 14, 16, 22; Brief of Amicus Curiae Associated Builders and Contractors, Inc. ("ABC Br.") at 13. Apparently, the employers' preferred union response to labor law violations is simply to permit the violations to continue. That the unions instead act on the recognition that, like other lawbreakers, nonunion contractors operating in violation of the NLRA are unlikely to change their ways absent union recourse to the legal system is hardly the practice of "blackmail". *See Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) (deterrence as one reason for backpay remedy under Title VII, 42 U.S.C. § 2000e(f)); *McKennon v. Nashville Banner Pub. Co.,* 115 S. Ct. 879 (1995).

Masonry, 314 NLRB No. 59 (1994) (union member fired after employer informed that the member would engage in organizing activity "consistent with his obligation as your employee, and as protected by the [Act]").

In this case as well the facts as found by the ALJ, and affirmed by the Board, demonstrate that T&C was practicing union discrimination pure and simple. The employment applications of the union members were, as far as appears, entirely truthful and accurate; the employer had no knowledge of the "salting resolution" on which it now so heavily relies; the bulk of the discriminatees were out-of-work union members, who, there is every reason to believe, would have gone to work and worked productively if hired (as the one union member hired, Hansen, actually did).

Not surprisingly, the ALJ emphatically found that Town & Country discriminated against the individual applicants because of their evident union backgrounds and against Hansen because of overt union organizing activity. Pet. App. 61a, 67a, 68a, 100a, 113a, 121a.[10] In particular, the ALJ rejected as "a composite of lies" the suggestion that Hansen was, intentionally or otherwise, "a poor worker who failed to meet productivity standards and who failed to perform in a craftsmenlike manner." Pet. App. 110a; *see also* 113a (expressly disbelieving the employer's position that Hansen engaged in "deliberat[e] . . . sabotage").

3. *Statutory "Employees" and Union Relationships*: On the actual facts of this case, then, as properly found by the Board, T&C was engaged in precisely the "embargo against employment of union labor . . . the removal of [which] was the driving force behind the enactment of the National Labor Relations Act," (*Phelps Dodge v. NLRB*, 313 U.S. 177, 186 (1941)), and nothing more.[11] T&C

[10] Much of T&C's factual account in its brief relies on facts and interpretations of facts specifically rejected by the Board, affirming the ALJ. Pet. App. 20a, 22a.

[11] *Phelps Dodge* holds—stating matters as precisely as we can—that individuals who, if hired, would be statutory "employees" are protected from discrimination in hiring by § 8(a)(3) and can be afforded backpay and reinstatement in the job under § 10. *Phelps Dodge* rests on the language of § 8(3), now § 8(a)(3), 29 U.S.C. § 158(a)(3), protecting against discrimination in "hire", read against the historical background of the statute. 313 U.S. at 186-87. And, *Phelps Dodge* reads § 10(c) of the Act, 29 U.S.C. § 160(c), as permitting the Board to order applicant discriminatees hired because § 10(c) speaks broadly of ordering "such affirmative action . . . as will effectuate the policies of this Act". 313 U.S. at 189 (emphasis supplied). *Phelps Dodge* therefore does *not*, as one amici would have it (AGC Br. at 6) import into the § 2(3) "employee" definition a provision covering applicants for employment not expressly found there.

nonetheless maintains that "discriminatory motive is immaterial" (T&C Br. at 36), because the relationship between the union and the discriminatees in this case is such that the discriminatees are not NLRA § 2(3) "employees" protected by the statute.

T&C's line of argument is that under established common law agency principles, the union in a situation such as this one exclusively controls a union member's activities while the member works for the employer, so that the working relationship with the employer is not an "employment" relationship. T&C Br. at 15; *see also, e.g., id.* at 35 (distinguishing "zealous Union supporters who, of their own free will, supported the Union" from individuals "contractually committed to the exclusive service to the Union"), *id.* at 34 ("[t]he salted organizer is required by the organizer's paramount contractual commitments to the Union imposed by the salting resolution to give precedence to the interests of the Union. . . .")

Specifically T&C, while acknowledging that under the common law "a person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to another" (Restatement (Second) Agency § 226 (1958) ("Rest."); *see* T&C Br. at 12), maintains that the circumstances here come within the part of the Restatement section comments noting that maintenance of "the control which a master can properly exercise over the conduct of the servant" may serve to "prevent simul-

taneous service for two independent persons." Rest. § 226, cmt. a.

To establish its position, T&C relies primarily upon the so-called "salting" resolution, and quite secondarily upon the fact that the discriminatees were, or would be, paid by the union while working for the employer. *See*, T&C Br. at 16-20, 34; *e.g.*, *id.* at 20 ("control imposed on the salted organizers herein by the fear of discipline for violating the salting resolution"). Thus, there has been a mighty shift from the initial formulation of T&C's argument that it is the cash nexus between the union and its members and/or paid union staff persons seeking work with contractors pursuant to a union organizing program that is the hallmark of their non-"employee" status. That shift is both understandable since the receipt of remuneration for advancing union interests could not possibly be sufficient alone to divest individuals of "employee" status (*see* IBEW Br. at 47-49), and revealing of the true breadth of T&C's argument.

(i) *The Exclusive Control Contention*: It is telling that T&C never quotes the "salting resolution." Rather, T&C's Brief (at 16-17) demonizes that resolution as one providing that "the salted organizers were only permitted to work for the nonsignatory employer if their sole purpose was furthering the Union's organizing effort" and stating that "the Union has primary control over everything the salted organizers do during the course of their work day." *See also, e.g.*, T&C Br. at 26, 34.

In fact, although the term "sole purpose" appears in quotation marks in T&C's Brief (at 17 n.16), the phrase appears nowhere in the Union's resolutions. Instead, the resolutions only state that members can be authorized "to seek employment by nonsignatory contractors for the purpose of organizing the unorganized." J.A. 256, 257. And, nothing in the resolutions indicate *any* union concern with or control over the manner in which work for the employer is performed, much less an assertion of "primary control over everything the salted organizers do during the work day." T&C Br. at 17. An "obligation

promptly and diligently [to] carry out organizing assignment" is the *only* specific obligation placed by the resolutions upon union members. That obligation hardly suggests "pervasive" and "paramount" union control over the assignment or carrying out of ordinary worksite tasks or indicates any intention to require organizing assignments to be carried out on *working* time.

Consistent with all this, the Board found that Hansen, while employed, performed productive work for T&C, under the employer's direction, and was paid for doing so. Nothing in the record indicates that the Union directed Hansen as to which electrical wires to install when, or which tools to use, or what productivity standards to meet, or how to install the wires, or what hours to work, or what safety precautions to take, or asserted the authority to do so. Rather, the Union intended that Hansen do precisely what the Board found that he did do: Work productively for the employer, under the exclusive direction of the employer's supervisors, during all working hours, and attempt on *nonworking* hours to interest his fellow employees in union representation.

This case, then, is one in which the discriminatees *were* (or would have been if hired) "subject to the directions" of T&C. Rest. § 1 cmt. b (quoted in T&C Br. at 11) with respect to its electrical business. The obligation the discriminatees had to the Union in no way interfered with, much less precluded the exercise of, the "control [T&C] can properly exercise over the conduct of the servant" (Rest. § 226 cmt. a). The situation here has nothing to do with the single situation T&C posits as precluding an "employee" finding; *viz.*, the situation in which an individual is *precluded* by an obligation to one employer from carrying out the tasks assigned by a second employer during the same time period (as would be the case, for example, if an electrician purported to work for two electrical contractors during the same hours, when each of the contractors worked at a different location and each directed that the electrician be present at its location, working on tasks it assigns, for those hours). Rest. § 226 cmt. a.

Having said that, it may be that T&C's submission is narrower than we have allowed and is limited to the assertion that the Union has claimed full control regarding whether union member workers engage in organizing activity during non-working time, and by so doing has deprived the employer of its power to control the employee and to direct him *not* to engage in such organizing activity. But *under the NLRA, employers have no right to issue directions to their employees with respect to union beliefs, union adherence or union activity conducted on non-working time.* As to those matters, the fact that a union member exclusively forwards a union interest rather than the nonunion employer's interest cannot detract from his/her § 2(3) "employee" status. And, that is true whether the member does so "voluntarily," pursuant to a union rule or in return for union pay.

We therefore return to the crux of our opening Brief. The work relationship between T&C and Hansen was assuredly such that had T&C maintained that Hansen was, for Internal Revenue Code purposes, not an "employee" although he performed productive electrical work on its jobsite under its direction for pay, T&C could not have prevailed.[12] Since the *same* standard for assessing "employee" status applies under the NLRA as under the tax laws (as well as under the tort law and most federal statutes, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992)), it follows that the individual discriminatees in this case are "employees" under the NLRA.[13]

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[12] In fact, Town & Country *did* pay employment taxes for Hansen. J.A. 201.

[13] Under the common law "employee" analysis, as we discussed at length in our opening Brief (at 34, 36-38), the standards governing employee *status* and those which determine the duties of loyalty an individual having that status owes the employer are entirely distinct. At some points, T&C, like the Eighth Circuit, ignores the distinction entirely. T&C Br. at 14 n.15 (quoting from treatises discussing duty rather than status issues); *id.* at 41-43 (discussing conflict of interest situations as if they determine the employee status question).

Some of the examples T&C uses (at 41-43) are illustrative of the confusion between status issues and duties of loyalty which has permeated this litigation. For example, while an employer violates the NLRA by placing an "agent" within the union representing its employees as a clerk or data processor, assigned to surreptitiously gather information while carrying out assigned tasks, we would assume that as long as the union in fact assigns the daily clerical tasks and determines how they are to be performed the "employer agent" is still, for common law purposes, the union's "employee" insofar as he/she is carrying out work for the union.

(ii) The *NLRA and Union Discipline*: Even viewed within the context of the NLRA standing alone, the notion that union members who are subject to internal union rules with regard to participation in concerted union activity while working thereby lose their status as NLRA "employees" would make a mockery of the § 7 *protection* accorded employees "to form, join, and assist labor organizations."

The "control" the union exercises over a union member pursuant to a salting resolution is the "control" to which union members generally subject themselves by voluntarily joining a union that establishes and enforces union rules. Just as a "salting resolution" may require union-member employees to abide by union rules, union constitutions and bylaws frequently require member-employees to join a strike (which, of course, is *intended* to harm the employer's economic interest, and which involves a member-employee commitment to leave work upon the collective decision of the employees, through the union). *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967).

Employees who do not wish to follow union rules—whether salting resolutions or strike solidarity requirements contained in union constitutions—are *entirely free* to refuse to join the union and *entirely free* to resign at any point. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Pattern Makers' League of North America v.*

NLRB, 473 U.S. 95 (1985). If the employee does so, "the union has no more control over the former member than it has over the man in the street." *NLRB v. Granite State Jt. Bd., Textile Workers Local 1029*, 409 U.S. 213, 217 (1972).

Thus, the "control" that a union has over a union member is the authority to require that *if, and as long as,* the individual wishes to remain a member, the individual must abide by union rules; if the individual comes to the conclusion while working for a nonunion employer that "the employees would be better off without the union" (T&C Br. at 18), he/she is free to retain employment, resign from the union, and cease any and all union organizing activity. *Pattern Makers*, 473 U.S. at 100-107.

T&C, however, would have it that an employee who voluntarily joins a union (and thereby agrees to abide by union rules) becomes an "agent" of the union for as long as she maintains her membership, and thus stands in the union's shoes rather than her own when engaged in otherwise-protected § 7 activity. Because "the NLRA confers rights only on employees, not on unions or their nonemployee organizers" (*Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532-33 (1992), the argument goes, an "employee" loses her status as such, and the protection of § 7, by joining a labor union that has adopted the kind of active organizing program at issue here.

This approach, if accepted, would force the individual union member to a Hobson's choice: She must either remain a union member and follow a union rule (for example, to go on strike when the union membership votes to do so), with the result that her conduct is no longer protected by § 7 because she is then acting as the "agent" of the union rather than as an "employee"; or resign from the union in order to maintain her § 7 protections. Section 7, however, protects the right of employees both to engage in *"concerted"* activity (emphasis supplied), and to "form, join, and assist labor organizations", not the right to act solely as an isolated individual or to form

formless organizations without rules. As this Court explained in *NLRB v. Allis-Chalmers Mfg. Co., supra,* holding that unions may discipline union members who cross picket lines during an authorized strike, the union's authority to enforce its rules is derived from the individual's right to choose to form a union and to engage in concerted action through the union:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions. . . . *Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.* [388 U.S. at 180-81 (emphasis supplied)]

See also NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 833 (1984) ("the formation of a labor organization is integrally related to the activity of joining or assisting such an organization . . . neither the individual activity nor the group activity would be complete without the other.")

It would reduce the Act to nonsense to say that the right of individual employees to join together in unions, and the derivative right of those unions to adopt and enforce reasonable and lawful rules of conduct, leads to the conclusion that the members thereby lose their status as "employees" and the protections of § 7.

4. *Additional Arguments*: We conclude by responding to three final arguments that are raised by T&C and its amici.

First, T&C argues that *Lechmere, Inc. v. NLRB, supra,* which holds that employers can invoke their property right to exclude "*nonemployee* union organizers" from their property, cuts against the proposition that the discriminatees in this case are statutory "employees." But

Lechmere states one side of a dichotomy. *Republic Aviation, supra,* which holds that employers cannot invoke their property rights against employee-organizers, states the other. And, state property laws do not control the determination of which individuals are "employees" and which are "nonemployees." It is the NLRA that controls this determination and it is the NLRA that in turn controls whether the *Lechmere* rule or the *Republic Aviation* rule applies. The rules announced in *Lechmere* and *Republic Aviation,* moreover, do *not* depend upon the nature of the relationship between the union and the nonemployee organizer. A nonemployee organizer without *any* formal relationship with a union seeking to hand out union literature, can be excluded from an employer's property just as readily as a union staff organizer. But that individual if hired by the employer most certainly is protected by § 7 in engaging in the same act in a nonworking area on nonworking time.

Second, T&C and its amici maintain that a literal reading of §§ 2(2) and 2(3) of the NLRA, 29 U.S.C. §§ 152(2) & (3), yields the result for which they argue. T&C Br. at 39; AGC Br. at 9; "Ch. Com. Br." at 22. The contention is that because "any labor organization (other than when acting as an employer)" is not an "employer" under § 2(2), and because § 2(3) states that in the NLRA employee class "any individual employed . . . by any other person who is not an employer as defined herein," individuals who are employees both of a labor organization and of a § 2(2) employer are not statutory "employees." This argument is doubly flawed.

To begin, even assuming that there is an employment relationship between the individual in question and a labor organization (as there need not be under T&C's new "control" argument), it is a strange form of literalism that concludes that while a labor organization *is* an employer "when acting as an employer," individuals employed by labor organizations are employed by a "person who is not an employer as herein defined." Literally speaking, rather, the statute makes clear that an employment relationship with a union is to be treated *no* differently from any other employment relationship under the Act. Since it is that very employment relationship upon which respondents rely (in part), a plain reading of the statute supports rather than detracts from the conclusion that the individuals are statutory "employees".

There is, moreover, the consideration that §§ 2(2) and 2(3) taken together cannot sensibly be read so as to exclude as an "employee" any individual employed by an employer not covered by the Act, even if that individual is *also* employed by a statutory employer. Such a construction would create a large realm of individuals excluded from the Act's coverage because of multiple employment; individuals who are railroad, airline, or agricultural employees, for example, would lose NLRA protection if also employed by an NLRA employer. "[T]his is a bit of verbal logic from which the meaning of things has evaporated." *Phelps Dodge, supra,* 313 U.S. at 101.

Obviously, the statutory definitions were not intended to interact in this exclusionary way. Rather, the only sensible construction of the Act is that each employment relationship is to be viewed discretely to determine whether, by virtue of *that* relationship, the individual was entitled to NLRA protection; if so, the existence of another relationship not covered by the Act is irrelevant.

Third, T&C and its amici make much of the fact that the NLRB, in *Sunland Construction Co.,* 309 NLRB 1224 (1992), concluded that employers do *not* violate the NLRA by refusing to hire paid union officials to work behind picket lines during a strike. T&C Br. at 43; Ch. Comm. Br. at 14; AGC Br. at 27; ABC Br. at 12. Whether or not the Board's *Sunland* decision is sound is beside the point here.

In *Sunland,* as here, the Board determined that the individual discriminatee *was* a statutory employee". 309 NLRB at 1226. It is this consistent Board rule that the Eighth Circuit overturned in this case and that is here at issue. How the statute's substantive provisions then apply in a myriad of possible discrete situations involving var-

ious considerations raises a series of second level substantive questions not presented by this case in its present posture. *See* n.2, *supra.*

In particular, the Board's holding regarding the strike situation in *Sunland* is of a piece with a body of Board law that elaborates a series of tailored rules regarding employer operations during the special situation of a strike. For example, despite the statutory obligation to bargain collectively with the exclusive representative of employees, "it is well settled that struck employers have no obligation to bargain about employment terms for replacements during the course of an economic strike." *GHR Energy Corp.*, 294 NLRB 1011, 1012 1989); *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 (1993) (same). This Court in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 792 (1990), expressly noted this line of cases and expressly recognized that because the strike situation is unique, the Board may make unique rules to cover it. For the same reason, the Board's decision here and its decision in *Sunland* on the reach of §§ 8(a)(1) & (a)(3) are in no way "irreconcilable" (*Curtin Matheson, id.* at 792).

CONCLUSION

For the reasons stated above and in our opening Brief, the judgment below should be reversed.

Respectfully submitted,

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